JD–44–03
West Chester, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NETWORK DYNAMICS CABLING, INC.	Cases 4–CA–30474
	4–CA–31007
and	4–CA–31194
	4–CA–31198
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98, AFL-CIO	4–CA–31472

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of Philadelphia, Pennsylvania, for Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on January 21-23 and February 3, 2003. The charges were filed between June 27, 2001 and July 23, 2002 and complaints were issued as a result. These cases were consolidated for hearing in October 2002.

The Union, IBEW Local 98, tried to organize Respondent Networks Dynamics Cabling (NDC) in 1996 and unsuccessfully tried to convince NDC to sign a collective bargaining agreement with it. This case, however, centers around the Union's successful efforts in 2001 and 2002 in persuading several NDC employees to join Local 98 and NDC's discharge of two of these individuals, Brian Tandarich, who it contends was a statutory supervisor, and Thomas Moore. The case also involves the removal of union supporter David Hughey from a jobsite and other efforts NDC allegedly made to discourage its employees from supporting the Union, such as interrogations, surveillance and the granting of wage increases.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] The General Counsel's motion to correct the transcript, which is attached to his post-hearing brief, is granted. Additions and corrections to the motion are as follows: 1) Mr. Ellmore's name is misspelled at transcript page 13, line 9; 2) on page 417, line 5 "perception" should read "exception to"; 3) Arcadia is misspelled at line 16 on page 489, and elsewhere; and 4) "*Johnnie's Poultry*" is misspelled at lines 8 & 18 on page 558. I would note that there are transcription errors in addition to those identified in this motion.

Findings of Fact

I. Jurisdiction

The Respondent, Network Dynamics Cabling, Inc. (NDC) installs low voltage cabling, such as telephone and computer lines, at its customers' places of business. It has an office in West Chester Pennsylvania, from which it annually performs services valued in excess of $50,000 outside the Commonwealth of Pennsylvania. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 98 of the IBEW, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's transfer of David Hughey from the UPS Philadelphia Airport project to jobsites more remote from his residence (Docket 4–CA–30474)

From May 2001 through early 2002, Respondent was engaged in installing low voltage cables at a United Parcel Service facility at the Philadelphia Airport. Initially, the highest ranking NDC employee on this project on a daily basis was John Czyzewski, whose title was "senior supervisor."[2] In May and June 2001, the members of the NDC crew at this site, Czyzewski, Brian Tandarich, also a "senior supervisor," Tim Faddis and David Hughey, technicians, met twice with Raymond Della Vella, a business agent and organizer for the Union. On the second occasion Bobby Morone, owner of Enterprise Cable Group, a signatory contractor, also met these employees.

Shortly thereafter, Czyzewski placed several union handbills on NDC equipment at the site and on the back window of NDC's van. He quit his employment and went to work for Enterprise Cable.

On or about June 16, David Hughey began wearing a Local 98 cap to work. The Union notified NDC that Hughey was a volunteer organizer for it the same day. The next day Hughey placed union handbills on the tables in the cafeteria/break room that was used by both NDC and UPS employees. Brian Tandarich, now the ranking onsite NDC employee, took some of the handbills to the UPS security office. An UPS security employee told Tandarich that UPS did not want Hughey to work on its property. Tandarich called Todd Stevenson, NDC's Director of Operations, to inform Stevenson about what had transpired and Stevenson directed Tandarich to bring Hughey back to the company's West Chester office.

When Hughey returned to NDC's office, Stevenson asked him why he was joining the Union. Hughey explained to Stevenson that he was joining the Union to obtain a higher wage. I find that Hughey either expressly or impliedly informed Stevenson that by joining the Union he intended to quit his job with NDC and take a job with a signatory contractor. Afterwards, Stevenson offered to promote Hughey to supervisor and give him a two-dollar an hour wage increase.

[2] The parties agree that NDC employees with the title of "supervisor" are employees, not supervisors within the meaning of Section 2(11) of the Act. The parties disagree as to whether a "senior supervisor" is an employee or statutory supervisor, or at least as to the status of Brian Tandarich between June 2001 and January 2002.

Hughey returned to work at the Airport site the next day, but the following day NDC assigned him to different site and on the third day sent Hughey to a UPS facility in Allentown, Pennsylvania to work with supervisor Jim Korejko. After Allentown, NDC assigned Hughey and Korejko to a UPS project in Wilkes-Barre. NDC concedes that it transferred Hughey from the Airport site because he distributed union literature at the project and contends that it did so at the request of UPS security personnel. Hughey had a 45-minute commute to the Airport site and over a two-hour commute to the NDC projects he worked on after his transfer. Other NDC employees also routinely commuted two hours or more to get to projects outside of the Philadelphia metropolitan area.

On July 16, before Hughey and Korejko left Respondent's shop to go to Wilkes-Barre, Todd Stevenson and Mark Bianco, Respondent's Operations Manager, asked Korejko to keep an eye on Hughey and report to them if anyone from the Union showed up at the jobsite. On their way from the Philadelphia area to the Wilkes-Barre project, Korejko and Hughey pulled into a rest stop on the Pennsylvania Turnpike. There they encountered Union Business Agent Della Vella, who went inside the rest stop and tried to convince Korejko to join the Union. Korejko reported this encounter to Todd Stevenson. On July 18, Hughey resigned his employment at NDC. Three days later Hughey began working for Enterprise Cable.

Analysis

Section 7 of the Act protects David Hughey's right to distribute union literature on UPS property, *Southern Services,* 300 NLRB 1154 (1990) *enfd.* 954 F.2d 700 (11th Cir. 1992). This right is not extinguished by objections to such distribution by UPS's security personnel, *Virginia Electric & Power Co.,* 260 NLRB 408, 409 (1982); *Mauka, Inc.,* 327 NLRB 803 (1999). Therefore, NDC violated Section 8(a)(3) and (1) in removing Hughey from the UPS airport jobsite—even assuming that it did so merely to placate UPS.

Moreover, the violation is neither negated nor mitigated by the fact that other NDC employees also were required to work several hours from Philadelphia. The UPS jobsite was desirable to Hughey and other employees precisely due to its proximity to their residences. Respondent concedes that it removed Hughey from the UPS airport project because of his distribution of union literature. In so doing it clearly discriminated against Hughey for his union activities.

Whether interrogation by a supervisor violates Section 8(a)(1) depends upon whether under the circumstances, it reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act, *Rossmore House,* 269 NLRB 1176 (1984). I find that Stevenson violated the Act by asking Hughey why he supported the Union. Even though Hughey was an open union supporter, the question was coercive in that it was asked in conjunction with Respondent's illegal removal of Hughey from the UPS airport jobsite.

On the other hand, I conclude that NDC did not violate Section 8(a)(1) in offering David Hughey a $2 per hour wage increase. In evaluating such an increase the Board applies the test in *Wright Line,* 251 NLRB 1083 (1980) enfd. 662 F. 2d 899 (lst Cir. 1981). The General Counsel must show the increase was motivated by the employer's anti-union animus, i.e., its desire to interfere, restrain or coerce employees in the exercise of their Section 7 rights. Once the General Counsel has proved its prima facie case, an employer may establish as an affirmative defense, i. e., a legitimate business reason for the timing of the increase, *Holly Farms Corp.,* 311 NLRB 273, 274 (1993); *Clock Electric, Inc.,* 338 NLRB No. 110 (2003).

I find that Respondent established that it had a legitimate reason for offering Hughey a wage increase, i.e., retaining him as an employee. At the time that Stevenson offered Hughey a raise, there is no evidence that the Union was seeking to make NDC a signatory contractor. All of its efforts were focused on convincing NDC employees leave NDC, join the Union and work for another contractor that had a collective bargaining relationship with it. Under these circumstances, I conclude that NDC had a legitimate reason to induce Hughey to continue working for it by offering him a raise.

Finally, I find that Respondent violated Section 8(a)(1) in asking James Korejko on or about July 16, 2001 to report any contact with the Union at the Wilkes-Barre project. I credit Korejko's uncontroverted testimony and find that Respondent violated the Act by asking him to spy on Hughey's union activities, *Alliance Rubber Co,* 286 NLRB 645, 658 (1987). NDC contends that this allegation in barred by Section 10(b) of the Act in that it was first raised in an amended complaint filed on September 25, 2002, over a year after the event in question.

The General Counsel argues that the allegation is not barred by Section 10(b) in that it is closely related to the charge filed December 11, 2001, which alleged that Respondent violated the Act by transferring Hughey from the airport site, offering him a raise and interrogating employees about their union activities. The Board has allowed litigation of untimely allegations if they are closely related to the allegations of a timely-filed charge, *Columbia Textile Services, Inc.,* 293 NLRB 1034, 1036, n. 13 (1989); *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988). I conclude that the complaint allegation is sufficiently related to the charge to withstand a challenge on the Section 10(b) grounds. It is sufficiently related in that all these allegations concern NDC's response to Hughey's union activities in June and July 2001.

Allegations relating to Brian Tandarich including unlawful wage increase, interrogation and his January 16 2002 discharge (Docket 4–CA–31007)

NDC hired Brian Tandarich in February 1997 and concedes that he was an excellent worker throughout his employment. In May 1998, Tandarich was promoted from technician to "supervisor." In February 2001, the anniversary date of his hiring, NDC gave Tandarich his annual performance evaluation. He was give a wage increase from $16.25 per hour to $17.75 per hour and was given the title "senior supervisor."

Respondent did not give Tandarich a written position description when it promoted him to "supervisor" or "senior supervisor." The company did not give him any additional oral instructions or training upon his promotion to senior supervisor. In this capacity, Tandarich performed essentially the same tasks that he performed as a "supervisor." Ninety percent of his day was spent performing manual labor and ten percent performing administrative functions, such as filling out employees' time sheets.

Both as a "supervisor" and a senior supervisor, Tandarich was often the highest-ranking NDC employee on the jobsite. At these sites he often told employees what particular tasks they would be performing after receiving instructions from either his project manager or a customer's representative as to the sequence in which work should be performed. Tandarich also filled out written evaluations regarding the performance of employees on these jobsites.

When John Czyzewski resigned his employment with NDC, Tandarich became the ranking NDC employee on the UPS Airport project. In this capacity he was generally in charge of a crew of four, but at times was in charge of as many as 12 employees. Prior to Czyzewski's departure, Tandarich, although a "senior supervisor," had no administrative or supervisory

responsibilities on the project. On June 13, 2001, just after Czyzewski's departure, NDC gave Tandarich a raise from $17.75 to $19 per hour.[3]

On October 15, 2001, Christopher Murphy, NDC's counsel, interviewed Tandarich concerning an unfair labor practice charge filed by the Union in connection with David Hughey's transfer. Tandarich executed an affidavit (R. Exh. 2). In late November 2001, Tandarich renewed his contacts with the Union. He asked Business Agent Ray Della Vella if he could still join. Della Vella told Tandarich he could if he would pass out union handbills and wear a Local 98 hat.

Murphy met with Tandarich again at NDC's office on January 8, 2002, with a view to having Tandarich sign another affidavit regarding his knowledge regarding the charge in case 4–CA–30474 (the Hughey matter). Murphy told Tandarich that there would be neither any benefit nor punishment resulting from the interview. Although Murphy stated that Tandarich's participation in the interview was voluntary, he conveyed precisely the opposite impression.[4] Despite Tandarich's protestations that he didn't want to be involved in the case, Murphy continued to seek his signature on an affidavit and asked Tandarich about his contacts with Ray Della Vella. He responded to Tandarich's concerns by telling him that "you know, you've been injected in it, or your name's been brought into it; and it's really not us who's bringing you into it. It's not the Company… (Tr. 546-47)."

Moreover, Tandarich tried to condition his participation in the preparation of the affidavit upon his being given the opportunity to review it with a third party; Murphy and NDC refused to allow him to take a copy of the draft. At this January 8, meeting, Tandarich reaffirmed his October statement and Murphy began working on a supplemental and more detailed affidavit. At Tandarich's request, Murphy agreed to meet Tandarich and his father at a Bob Evans restaurant. Due to a conflict in Murphy's schedule, attorney Michael Lignowski met Brian and Bernard Tandarich at Bob Evans on January 15, 2002.

Lignowski explained that he was investigating a charge filed by the Union against NDC. Lignowski did not indicate to Brian Tandarich that he could refuse to co-operate with him if he so desired. He then gave Brian and Bernard a copy of an affidavit stamped "draft." Lignowski's copy was not stamped "draft." Lignowski discussed concerns that one or both had with certain portions of the affidavit. After awhile, Brian Tandarich got up from the table with his copy of the affidavit and went out to the restaurant lobby. He returned wearing a Local 98 hat and without the document, which he had given to Ray Della Vella. Lignowski left the restaurant.

The next day, Todd Stevenson, then NDC's director of operations, fired Brian Tandarich ostensibly for giving a copy of the affidavit to the Union. Tandarich began working for a signatory contractor the following day. On or about March 20, 2002, NDC sent Tandarich a

[3] Tim Faddis, another NDC employee at the UPS Airport site was also given a wage increase of $1.25 per hour on June 28, 2002, and promoted to "supervisor." This was within a month of Czyzewski's departure and Hughey's overt union activity. The General Counsel sought to amend the complaint on the last day of hearing to allege that Faddis' wage increase violated Section 8(a)(1). I denied that motion but allowed the General Counsel to argue that Faddis' raise, which did not correspond to the anniversary of his date of hire, or a performance evaluation, supported the complaint allegation that Tandarich's June 13 wage increase violated the Act.

[4] Respondent contends that Tandarich was a statutory supervisor and that therefore it was entitled to insist upon his co-operation in its investigation of the Union's charges.

letter threatening to prosecute him if he failed to return certain items of company property, including a rotary hammer and power saw. There is no credible evidence that Tandarich possessed any of these items. The Union responded by letter informing Todd Stevenson that Tandarich had possession of one NDC ladder and that Stevenson could make arrangements with the Union for its return.[5]

Analysis of Allegations relating to Brian Tandarich

Respondent has not established that Brian Tandarich was a supervisor within the meaning of Section 2(11) of the Act.

I would dismiss most, if not all, of the General Counsel's allegations regarding Brian Tandarich, if, I were to find, as Respondent contends, that Tandarich was a supervisor within the meaning of Section 2(11) of the Act. Thus, I address this issue before addressing the specific violations alleged with regards to Tandarich. Pursuant to section 2(3) of the Act, "supervisors" are not employees and are generally not protected by the Act. However, an employee's title is not controlling and often is only marginally relevant in determining whether one is a statutory supervisor.

Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

While some of the testimony related to the duties of an NDC "senior supervisor", I conclude that the issue of Tandarich's status must be analyzed with regard to the authority invested in him, rather than in "senior supervisors" generally. It may be that some "senior supervisors" were statutory supervisors and others were not. In this regard, the record establishes that some NDC "senior supervisors" received a written job description and others, including Tandarich, did not. Some "senior supervisors" may have received oral instructions regarding their authority, but Tandarich did not.

There is no evidence that Tandarich had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or adjust their grievances. He did direct employees at the UPS airport jobsite to some extent. There is also no credible evidence that Tandarich had the authority to effectively recommend discipline or any of the other statutory factors. Indeed, the record indicates that when Tandarich was unhappy with the punctuality of several employees at the airport jobsite, he had to go to Todd Stevenson to get anything done about this problem.

The only distinction that Respondent has established between Tandarich and other non-supervisors is that he was the senior NDC onsite representative on a relatively large project. The size of the project does not make Tandarich a supervisor unless he had the type of authority that is delineated in the statute.

[5] Complaint paragraph 5 in Docket 4-CA-31194 & 31198 (G.C. Exhibit 1 (bb) alleges that NDC's letter violated Section 8(a)(1).

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. The fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience, *Southern Bleachery and Print Works, Inc.,* 115 NLRB 787, 791 (1956), enfd. 257 F. 2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority of an irregular and sporadic basis is not sufficient to establish supervisory status, *Browne of Houston,* 280 NLRB 1222, 1225 (1986).

In *John N. Hansen Co.,* 293 NLRB 63-64 (1989), the Board found that David Gillespie was not a supervisor. Gillespie monitored employees' attendance and signed their timecards. He exercised authority to adjust employees' work assignments within the limits of instructions from his employer. Gillespie interviewed job applicants that his employer had tentatively decided to hire. However, the Board found that Gillespie's direction and assignment of routine work did not entail the exercise of independent judgment within the meaning of section 2(11).

In *Chicago Metallic Corp.,* 273 NLRB 1677 (1985) enfd. in relevant part 794 F. 2d 527 (9th Cir. 1986), the Board similarly found that Ralph Picazzo was not a supervisor. Picazzo reviewed the performance of other machine operators and graded them on an evaluation form. He made overtime assignments at his discretion from a list of eligible employees. Likewise, in *Browne of Houston, supra*, the Board found that Doyle Womack was not a supervisor. Womak exercised the authority to transfer employees to different tasks for short periods of time. In this respect, his authority was not unlike that of Tandarich. Womack had the authority to shift employees from one production line to another if the line they were working on was slow or shutting down. Womack also interviewed job applicants and advised his superiors with regard to the applicants' experience.

More recently, the Board in *Azusa Ranch Market,* 321 NLRB 811 (1996) found that Steve Virgen was not a supervisor. Virgen, who worked in a grocery store, assigned other employees to the tasks of filling the milk cooler, stocking shelves, sweeping and cleaning. He would at times take employees off a cash register to do other tasks. Virgen was in charge of the store for several hours each day after the general manager went home. When the general manager left, Virgen could decide to let employees leave early and use their leave. He was consulted about the job performance of other employees. Finally, although employees were entitled to a break every 2 hours, Virgen decided when, within that time period, an individual employee would take his or her break. Also see *Green Acres Country Care Center,* 327 NLRB No. 57 (November 30, 1998).

There is no evidence that Tandarich considers the relative skills of employees in shifting them from one task or crew to another. This is another indication that his authority is so routine that it cannot be relied upon to deem him a statutory supervisor, *J.C. Brock Corp.,* 314 NLRB 157, 158 (1994). Similarly, the fact that Tandarich is solicited for his opinion regarding the work performance of other employees does not establish his supervisory status, particularly since there is no indication that his opinion is determinative regarding any personnel action, *Adco Electric,* 307 NLRB 1113 at 1125 (1992). Tandarich's primary function involved physical participation in the production or operating processes of NDC's business. He incidentally directed the movements and operations of less skilled employees. He had a close community

of interest with these less experienced coworkers and thus, I find that Respondent has not established that Tandarich was a supervisor, *Southern Bleachery and Print Works, supra*.

Specific Allegations relating to Tandarich

The June 13, 2001 wage increase

Whether Tandarich's June 13, 2001 raise was unlawful turns on proof of Respondent's motivation. Under the *Wright Line* causation test, the General Counsel bears the initial burden of showing that the raise was motivated, at least in part, by anti-union considerations. The General Counsel can meet this burden by showing that employees were engaged in union activity, that the employer was aware of the activity, that the employer harbored animus towards the union or union activity and that the allegedly violative personnel action was caused by anti-union animus. Once this showing is made, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of protected conduct, *Clock Electric, Inc.,* 338 NLRB No. 10 (2003). The employer must show a legitimate nondiscriminatory reason for the timing of the increase, *Holly Farms Corp.,* 311 NLRB 273, 274 (1993).

In the instant matter, there is no evidence that Respondent was aware that Tandarich had engaged in any union activity when it gave him the wage increase. It was aware that John Czyzewski had engaged in union activity at the UPS airport jobsite. From this record, I conclude that NDC gave Tandarich his raise before it was aware of David Hughey's union activities. Given Respondent's removal of Hughey from the airport site, I conclude that Respondent harbored animus against the Union and employees who supported the Union. However, in the absence of any evidence that it was aware of Tandarich's interest in the Union, I find that the General Counsel has failed to prove that the June 13 raise was motivated by anti-union animus and I credit Respondent's explanation that the raise was given to compensate Tandarich for the fact that he had just become the ranking onsite NDC employee on a large jobsite. I therefore dismiss this allegation of the complaint.

Respondent, by counsel, violated Section 8(a)(1) in interrogating Tandarich on January 8 and 15, 2002.

An employer or its agent may interrogate an employee to respond to an unfair labor practice charge, or prepare for litigation of a charge only if affords the employee specific safeguards against coercion. The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place and obtain his participation on a voluntary basis. The questioning must occur in a context free from hostility to union organization and must not be itself coercive in nature. The questions must not pry into other union matters, elicit information concerning an employee's subjective state or mind or otherwise interfere with the statutory rights, *Johnnie's Poultry Co.,* 146 NLRB 770 (1964). If these safeguards are not afforded to the employee, the interrogation violates Section 8(a)(1).

I find that Respondent's counsel Christopher Murphy violated Section 8(a)(1) by insisting that Brian Tandarich continue in the preparation of an affidavit or certification after Tandarich made it clear that he did not want to continue doing so. I also find that Tandarich's participation in the affidavit process was no longer voluntary when Respondent and Murphy refused to allow him to review a draft with persons of his choosing, including the Union. I find that Tandarich's insistence of reviewing the draft with persons of his choosing was not unreasonable and that he had a right to refrain from assisting Respondent if this condition was not met, *Gerbes Super Markets,* 176 NLRB 11 (1969).

Lignowski also failed provide Tandarich with the required safeguards at the Bob Evans Restaurant meeting of January 15. Lignowski did not assure Tandarich that he could choose not to discuss the charge or provide the affidavit if he did not want to do so. Since Murphy had by his conduct on January 8 effectively insisted on Tandarich's cooperation, it was incumbent on Lignowski to wipe the slate clean insofar as the *Johnnie's Poultry* requirements were concerned.

Respondent violated Section 8(a)(3) and (1) by discharging Brian Tandarich on January 16, 2002.

Respondent fired Brian Tandarich the day after it discovered that he joined the Union. The circumstances of his discharge satisfy the General Counsel's initial burden of showing anti-union animus and discriminatory motive. However, Respondent argues that it has an affirmative defense in that Tandarich disclosed confidential information and attorney work product (Respondent's brief at page 11).

First of all, the affidavit, GC Exhibit 14, does not contain any confidential information. It consists solely of a recitation of facts allegedly provided to Respondent's counsel by Tandarich himself regarding Tandarich's knowledge of facts relating to an unfair labor practice charge by the Union. Since the affidavit is purely factual its status as "attorney work product" is questionable. The work product doctrine protects "against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning litigation," *Mervin v. FTC,* 591 F.2d 821, 825-6 (D.C. Cir. 1978); *Powell v. U. S. Department of Justice*, 584 F. Supp. 1508 (N. D. Cal. 1984). Nothing in the draft affidavit Tandarich gave to the Union fits within the description above. While some courts regard any statement taken by an attorney to be work product, *In re: Convergent Technologies,* 122 FRD 555 (N.D. Cal. 1988), others take a contrary view. In 1994, the District Court in Alaska opined, "what a witness knows is not the work of counsel," *Dobbs v. Lamonts Apparel, Inc.,* 155 FRD 650 (D. Alaska 1994).

Regardless of whether the draft affidavit can be properly characterized as attorney work product, I find that Tandarich's sharing it with the Union does not establish an affirmative defense for Respondent. He divulged to the Union either what he knew about the charge in question or what Respondent wanted him to say about the charge. He did not divulge any confidential business information or any of its attorney's mental impressions. I therefore conclude that NDC violated the Act in discharging Tandarich on January 16, 2002.

Respondent did not violate the Act in sending Tandarich a letter threatening to prosecute him if he did not return its equipment.

Respondent failed to establish that Tandarich possessed any of the equipment it demanded that he return in its March 2002 letter. Its threat of prosecution therefore appears to be largely motivated by its animus towards his union activities. However, I find that the letter was not reasonably likely to interfere with, restrain or coerce Tandarich in the exercise of his Section 7 rights. Tandarich had already quit his employment and was working with a signatory contractor. The letter was unlikely to have any impact on his continued support for the Union or his assistance to the Union and General Counsel in pursuing unfair labor practice charges. The only impact it was likely to have is to motivate him to return any equipment he did possess or respond by informing NDC that their information was incorrect.

NDC's alleged removal of Thomas Moore from the Arcadia University jobsite; NDC's alleged refusal to assign Moore work on April 4 and 5, 2002; and NDC's April 5, 2002 discharge of Thomas Moore (Dockets 4–CA–31194 and 31198)

NDC hired Thomas Moore in May 2000. Moore was promoted to "supervisor" in August 2001 and given a wage increase to $15 per hour. On February 21, 2002, Moore signed a union authorization card.

On March 20, 2002, NDC assigned Moore and fellow "supervisors" Tim Faddis, Kirk Moore and Kevin Harris to the Arcadia University project. Harris was reassigned to another jobsite on April 1. On Tuesday, April 2, Thomas Moore distributed union flyers at the Arcadia worksite. Respondent's operations manager, Todd Stevenson, was aware that Moore had done so. That afternoon Respondent's operations manager, Mark Bianco, called Moore and told him he would be working on another jobsite the next day.

On Wednesday, April 3, Moore was assigned to work with Jim Korejko on the Norwood Construction Company's offices in Cherry Hill, New Jersey. Moore contacted union business agent Ray Della Vella, who observed Korejko's company van on the Benjamin Franklin Bridge and followed Korejko and Moore, who were in separate vehicles, to the Norwood jobsite. Korejko notified Todd Stevenson, that he was being followed. Upon arriving at the site, Della Vella tried to convince Korejko to join the Union.

On the afternoon of April 3, Moore called Bianco to inquire as to where he would be working the next morning.[6] Bianco told Moore he didn't know yet and that Moore should report to the NDC office. Moore asked about going back to the Arcadia job. Bianco told him that Kirk Moore and Tim Faddis could handle all the work that was available at Arcadia.[7]

On Thursday morning, April 4, 2002, Moore reported to Bianco. Bianco told Moore that he did not have any work for him that day and that he would have to take the day off. Moore protested, saying that he had already had to take a day off in January and another in March and that it was somebody else's turn to take a day off.[8]

At some point Todd Stevenson joined in the conversation. Stevenson told Moore that he was not the only employee being forced to take days off due to lack of work. They then discussed several other employees' work schedules. Moore asked Bianco if he would be working on Friday, April 5. Bianco told Moore he would have to call him later in the day. Moore and Stevenson then had a very heated discussion. Stevenson referred to the call he had received from Jim Korejko the day before about being followed to the Norwood site. He told Moore that he could not keep telling Ray Della Vella where NDC was working. Moore alleged that he was not being assigned work due to his union activities and asked Stevenson several times whether he was being fired. At the end of the discussion Moore left.[9] Stevenson fired

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[6] Jim Korejko, now a union member, testified that there was not enough work for two employees at Norwood on April 4, and that he so advised Todd Stevenson.

[7] Kirk Moore and Tim Faddis had greater seniority with NDC than did Thomas Moore.

[8] Moore used paid vacation or personal days on these occasions.

[9] Moore's account and Stevenson's account of the conversation differ significantly. Stevenson contends that Moore was screaming and cursing him. Jason Ellmore, an NDC project manager who was laid off in November 2002 testified that he heard the last five minutes of the conversation. He observed that both Moore and Stevenson were upset and that Moore kept asking Stevenson if he was being fired. Ellmore did not hear Moore scream at Stevenson

Continued

Moore the next day. On Thursday, April 11, Moore began working for Newon Communications, a signatory contractor.

Analysis of allegations regarding Thomas Moore

The General Counsel has not established a prima facie case that the removal of Thomas Moore from the Arcadia worksite or the Norwood worksite was discriminatory.

The record shows that although the Arcadia University project was one of NDC's larger project in March 2002, the manpower requirements for the project were decreasing towards the end of the month. Kevin Harris, one of the four "supervisors" working on the project during the week of March 25, 2002, was reassigned to another job on April 1. After Thomas Moore was removed from the job on April 2, only two employees, both senior to Moore, worked at Arcadia until April 18, GC Exh. 28.

The General Counsel argues that I should draw an adverse inference from Respondent's failure to call Operations Manager Mark Bianco as a witness. Bianco made the decision to remove Moore from the Arcadia project and apparently still works for NDC. I decline to infer that Bianco, if he had testified, would have admitted that Thomas Moore was transferred from Arcadia for discriminatory reasons. Not only does Respondent's schedule indicate that this not the case, but the General Counsel and/or Charging Party could have called David Maston, the Arcadia project manager as a witness. Maston now works one of the Union's signatory contractors. In sum, I find that the General Counsel has failed to establish that Thomas Moore's removal from the Arcadia jobsite was discriminatory.

The General Counsel has likewise failed to prove that Moore's removal from the Norwood project after one day of work on April 3 was discriminatorily motivated. Testimony from the General Counsel's witness, James Korejko, confirms that there was insufficient work at Norwood for two employees on April 4.

Finally, the General Counsel has not established that Respondent's failure to assign Moore to a job on Thursday, April 4, or Friday, April 5, was discriminatory. Respondent's schedule, GC Exh. 28 corroborates Jason Ellmore's testimony that NDC was having difficulty finding work for all its employees in early April 2002. Moore was one of several employees who were apparently not assigned work on April 4 and 5, including supervisor John McCuollough, whose seniority was greater than Moore's.

NDC violated Section 8(a)(3) and (1) by terminating Thomas Moore on April 5, 2002.

The General Counsel has made a *prima facie* showing that NDC's termination of Thomas Moore was discriminatory. NDC was aware of his union activity and harbored animus towards any activity of its employees on behalf of Local 98. Todd Stevenson was particularly upset at Moore because he correctly deduced that Moore had told Ray Della Vella where he and Korejko were going the day before. I also find that Respondent's disparate treatment of Moore, as compared to Nick Leydet in November 1999 establishes discriminatory motivation with regards to Moore's discharge. Despite the fact that Leydet's use of profanity had caused a customer to remove an entire NDC crew from a jobsite, Stevenson, retained Leydet as an employee. The timing of Moore's discharge and the pretextual nature of Respondent's

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or curse at him. I credit Ellmore's testimony and decline to credit Stevenson's testimony that Moore cursed at him or refused to leave NDC's premises.

explanation for the discharge satisfy the General Counsel's burden of proving discriminatory motive. Respondent has not established an affirmative defense that it fired Moore for nondiscriminatory reasons.

The only rationale that NDC offers for Moore's discharge is that his conduct on April 4, 2002 towards Stevenson was sufficiently insubordinate to lose the protection of the NLRA. Respondent has not shown this to be the case. All it has established is that Moore had a 5–10 minute heated argument with Stevenson about his lack of work assignments. Giving consideration to the factors set forth in *Felix Industries,* 331 NLRB 144 (2000) I conclude that the nature of Moore's outburst did not forfeit the protection of the Act. This is particularly so given his not unreasonable, although unproven, belief that he was not being assigned work due to his union activity.

Alleged Coercive Interrogation of James Korejko by Respondent's counsel (Docket 4–CA–31472)

On May 14, 2002, one of NDC's attorneys in this case, Robert Nagle, called James Korejko on the telephone. Todd Stevenson had told Korejko that Nagle would be calling and asked if he would speak to him; Korejko replied affirmatively. Nagle told Korejko that he did not have to talk to him if he did not want to do so. He also stated that Korejko would not be rewarded or punished on account of his conversation with Nagle. Korejko agree to talk to Nagle.

Nagle asked Korejko about his encounter with Ray Della Vella on the way to the Norwood jobsite on April 3. He also asked Korejko what they had discussed and whether Korejko had felt harassed. Nagle then asked Korejko whether he had talked to Della Vella since April 3. On July 19, 2002, Korejko went on strike and started work a week later for a signatory contractor.

Analysis of allegations regarding Korejko

I find that Respondent, by counsel, violated Section 8(a)(1) during the May 14, 2002 interview with Korejko. While, NDC was perfectly justified in interrogating Korejko about the circumstances surrounding his phone call to Todd Stevenson and Della Vella's conduct on April 3, 2002, Respondent exceeded the permissible bounds of inquiry set forth in *Johnnie's Poultry, supra*. It did so when Nagle inquired into the subject matter of Korejko's conversation with Ray Della Vella and when it asked Korejko whether he had any contact with Della Vella after April 3, 2002.

Conclusions of Law

Respondent, Network Dynamics Cabling, Inc., violated:

1. Section 8(a)(3) and (1) by transferring David Hughey from the UPS Philadelphia Airport project on or about June 20, 2001, to restrain and interfere with his union activities;

2. Section 8(a)(1) by asking Hughey why he supported the Union on or about June 20, 2001.

3. Section 8(a)(1) by asking James Korejko to report on the union activities of David Hughey on or about July 16, 2001.

4. Section 8(a)(1) by interrogating Brian Tandarich about his union activities on January 8 and 15, 2002.

5. Section 8(a)(3) and (1) by discharging Brian Tandarich on January 16, 2002.

6. Section 8(a)(3) and (1) by discharging Thomas Moore on April 5, 2002.

7. Section 8(a)(1) by interrogating James Korejko on May 14, 2002.[10]

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Network Dynamics Cabling, Inc., West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting IBEW Local 98 or any other union.

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[10] I dismiss the Complaint allegations with regard to the following Section 8(a)(1) allegations:

Paragraph 5(a) in Docket 4-CA-30474—I find that Todd Stevenson's remark to David Hughey in June 2002, that he'd heard that Ray Della Vella had been at one of NDC's worksites does not constitute a coercive interrogation under the criteria set forth in *Rossmore House, supra.*

Paragraph 5(b) of Case 4-CA-31194 & 31198: Stevenson's remark to Thomas Moore in March 2002 that he'd heard that Ray Della Vella had been at one of Respondent's jobsites does not rise to the level of a coercive interrogation.

Paragraphs 5(a) and 5(b) in 4-CA-31472: I credit Jason Ellmore's testimony that he never discussed any other employee's union activities with James Korejko in dismissing 5(a). With regard to 5(b), I find that Stevenson's discussions with Korejko on April 3, were not coercive given the fact that they were in response to Korejko's call to Stevenson regarding an unidentified person following him.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Coercively interrogating any employee about union support or union activities.

(c) Spying on, or placing under surveillance the union activities of any employee.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its West Chester, Pennsylvania office copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. April 10, 2003.

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Arthur J. Amchan
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting IBEW Local 98 or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT spy on, or place under surveillance your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Brian Tandarich and Thomas Moore and WE WILL,

within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-7643.